ADAM RICHARDS LLC Adam Richards (AR-2489) 90 Broad Street, 25th Floor New York, New York 10004 Telephone: (212) 233-4400 adam@arichardslaw.com

Attorney for Plaintiff Dustin Kessler

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

DUSTIN W. KESSLER,

Plaintiff,

- against -

HARRY BAUER RODRIGUES a/k/a BAAUER, MIXED MANAGEMENT, INC., PROMETHEUS GLOBAL MEDIA LLC d/b/a **BILLBOARD** MAGAZINE, ROLLING STONE LLC, AEG LIVE d/b/a COACHELLA MUSIC FESTIVAL, PITCHFORK MEDIA, INC. d/b/a PITCHFORK.COM, HARRIS PUBLICATIONS, INC. d/b/a **ELEKTRO** DAILY.COM, SPIN MEDIA, LLC d/b/a SPIN MAGAZINE, SUPERFLY MUSIC PRODUCTIONS, INC. d/b/a OUTSIDE LANDS MUSIC AND ARTS FESTIVAL, p/k/a SUS BOY and JOHN DOES 1-50.

Defendants.

JUDGE RAMOS

13 CV 5084



Plaintiff Dustin W. Kessler, by and through his undersigned attorneys, ADAM RICHARDS, LLC, hereby complain of Defendants as follows:

#### JURISDICTIONAL STATEMENT

- 1. This complaint alleges causes of action under the Copyright Laws of the United States, Title 17 of the United States Code and the laws of the State of New York. Subject matter jurisdiction is conferred by 28 U.S.C. §§ 1331, 1338 and 2201.
  - 2. This Court also has jurisdiction over the action pursuant to 28 U.S.C

§1332 because there is complete diversity between the parties and the amount in controversy exceeds \$125,000, exclusive of interest and costs.

#### PARTIES AND VENUE

- 3. Plaintiff Dustin W. Kessler (hereinafter "Kessler" or "Plaintiff") is an individual residing at 1083 Terrace Drive Richmond Heights, Missouri 63117.
- 4. Kessler is a professional freelance photographer and artist. He is a touring photographer who has gained national recognition for, among other things, his original photographs of musicians taken while performing live as well as in the studio.
- 5. Upon information and belief, Defendant Harry Bauer Rodrigues a/k/a "Baauer" ("Baauer") is a resident of the State of New York, County of Kings.
- 6. Baauer is a well known DJ and producer. His composition "Harlem Shake" won the awards of Dance Song of the Year and Electronic Dance Music Song of the Year at the 2013 Billboard Music Awards. "Harlem Shake" went to Number One on the Billboard Hot 100 chart and stayed there for five (5) weeks. According to co-defendant Rolling Stone, "Harlem Shake" has been viewed more than 400 million times on YouTube. Since then, Baauer has gone on to work with numerous well-known musical acts including The Prodigy and No Doubt. Baauer has also appeared and performed at some of the largest music festivals around the world, including Coachella and the Outside Lands Music and Arts Festival.
- 7. Defendant Mixed Management, Inc. ("Mixed Management") is a New York corporation. Upon information and belief, Mixed Management's principal place of business is in Los Angeles, CA.

- 8. Mixed Management provides management for Baauer and a number of other successful DJs, producers, musicians and artists.
- 9. Defendant Prometheus Global Media LLC ("Prometheus") is a Delaware corporation duly authorized to do business in the State of New York. Prometheus is an entertainment publishing company with a principal place of business located at 770 Broadway, 7th Floor, New York, New York 10003.
- 10. Upon information and belief, at all relevant times hereto, Prometheus conducts business under the name Billboard Magazine.
- 11. Defendant Rolling Stone LLC ("Rolling Stone") owns and operates the iconic Rolling Stone magazine. It is a Delaware corporation duly authorized to do business in the State of New York. Its principal place of business is located at 1290 Avenue of the Americas, New York, New York 10104.
- 12. Defendant AEG Live, LLC ("AEG") is a Delaware corporation duly authorized to do business in the State of New York with a regional office located at 145 West 145<sup>th</sup> Street, New York, New York 10036.
- 13. AEG is dedicated to all aspects of live and contemporary music performance and is comprised of touring, festival, exhibition, broadcast, merchandise and special event divisions. One of AEG's most popular and largest music festivals is the Coachella Music Festival.
- 14. Defendant Pitchfork Media, Inc. ("Pitchfork Media") is an Illinois corporation duly authorized to do business in the State of New York with an office in New York located at 669 Meeker Avenue, Brooklyn, New York.
  - 15. Upon information and belief, at all relevant times hereto, Pitchfork Media

conducts business under the name Pitchfork.com., which is an Internet based daily music magazine dedicated to music news and criticism.

- 16. Defendant Harris Publications, Inc. ("Harris") is a New York Corporation with its principal place of business located at 1115 Broadway, New York, New York 10010.
- 17. Upon information and belief, at all relevant times hereto, Harris owns and operates Elektro Daily.com, which is a daily Internet based electronic music magazine.
- 18. Defendant Spin Media, LLC is a Delaware corporation duly authorized to do business in the State of New York with a regional office located at 276 Fifth Avenue, 5th Floor, New York, New York 10010.
- 19. Defendant Superfly Music Productions, LLC ("Superfly") is a New York Corporation with its principal place of business located at 64 West 3rd Street, Suite 205, New York, New York 10012. At all relevant times hereto, Superfly, owns and operates the Outside Lands Music and Arts Festival, a large annual 3 day music festival that takes place in the Golden Gate Park in San Francisco, CA.
- 20. Defendant p/k/a Sus Boy ("Sus Boy") is a renowned graphic artist whose works can be found at susboy.com. Upon information and belief, at all times relevant hereto, Sus Boy was managed by Defendant Mixed Management.
  - 21. Venue is proper in this judicial district pursuant to U.S.C. §§1391 and 1400.

#### STATEMENT OF THE CASE

22. This is an action for the willful infringement of Plaintiff's copyrights in five (5) of Plaintiff's photographs of Baauer (jointly, the "Copyrighted Works"). The Copyrighted Works have been used by Defendants to promote the work and career of

Baauer in breach of Plaintiff's federally registered copyrights. Plaintiff therefore seeks recovery of all remedies available under law including but not limited to its damages, all of Defendants' profits, and payment of Plaintiff's attorneys fees and costs.

#### FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

- 23. In or around October 2012, Plaintiff met with Baauer at a venue called "The Gramaphone" in St. Louis, MO and engaged in a photo shoot of Baauer. After the photo shoot, Baauer informed Plaintiff that he liked the photos and asked Plaintiff to send Plaintiff's photos to Defendant Mixed Management for review.
- 24. On or about October 24, 2012, Defendant Mixed Management contacted Plaintiff and asked Plaintiff for his permission to use one of the Copyrighted Works for the express limited purpose of Baauer's Facebook profile picture, which Plaintiff agreed to.
- 25. On or about November 8, 2012, Defendant Mixed Management again contacted Plaintiff and asked Plaintiff for his permission to use one of the Copyrighted Works for the express limited purpose of "a magazine piece."
- 26. In response Plaintiff provided one of the Copyrighted Works to Mixed Management. However, the Copyrighted Work or Works in question were not simply used for "a magazine piece."
- 27. In fact, since around November 2012, without Plaintiff's permission or consent, and without any compensation being made to Plaintiff, one or other of the Copyrighted Works have been published numerous times in numerous print and on-line publications including, but not limited to, Defendant Rolling Stone Magazine, (Exhibit A), Defendant Spin (Exhibit B), Defendant Billboard Magazine (Exhibit C), Defendant

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Pitchfork.com (Exhibit D) and Defendant Elektro Daily.com (Exhibit E).

- 28. In addition, at least one of the Copyrighted Works has been published by Defendant AEG in advertising and promotional materials to publicize the Coachella Music Festival and Baauer's appearance at that festival (Exhibit F).
- 29. Similarly, at least one of the Copyrighted Works has been published by Defendant Superfly in advertising and promotional materials to publicize the Outside Lands Music and Arts Festival and Baauer's appearance at that festival (Exhibit G).
- 30. One of the Copyrighted Works also appears on Baauer's website, Baauer.com (Exhibit H). One of the Copyrighted Works also appears on Mixed Management's website (<a href="www.mixedmanagement.com">www.mixedmanagement.com</a>) where it is used to publicize Mixed Management's "roster" of artists.
- 31. Upon information and belief, in several of the foregoing publications, at least one of the Copyrighted Works had been doctored by one or more of the Defendants, including but not limited to defendant Rolling Stone, defendant Superfly and defendant Sus Boy, thereby creating derivative works from the Copyrighted Works.
- 32. Upon information and belief, Defendant Sus Boy created derivative works from the Copyrighted Works which were published in several of the foregoing publications, as well as numerous other publications, as publicity for Baauer's 2013 U.S. tour (Exhibit I).
- 33. Upon information and belief, the Copyrighted Works have appeared in other print and on-line media outlets both in the United States and overseas.
- 34. On or about April 1, 2013 Plaintiff filed for a copyright registration from the United States Copyright Office for each of the Copyrighted Works.

- 35. Defendants did not seek Plaintiff's permission before exploiting the Copyrighted Works and permitting the same to be used in the publicity, print and on-line media outlets provided for above.
- 36. Plaintiff was never credited as the creator and/or photographer of the Copyrighted Works in any of the media and publicity outlets provided for above.
- 37. At all times relevant hereto, Plaintiff has been and still is the owner of the Copyrighted Works and has never assigned, licensed or otherwise transferred any of his interest in the Copyrighted Works to Defendants or dedicated them to the public.
- 38. Despite multiple attempts by Plaintiff to discuss with Defendant Mixed Management the licensing of the Copyrighted Works and/or compensation and credit for the foregoing exploitation of the Copyrighted Works, Defendants have failed and refused to compensate Plaintiff for any of the foregoing uses of any of the Copyrighted Works.

#### As and for a First Cause of Action COPYRIGHT INFRINGEMENT

- 39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38 as if fully set forth herein.
- 40. This cause of action arises under the United States Copyright Act 17 U.S.C. § 101 et seq.
- 41. Plaintiff owns the copyrights in and to the photographs embodied in the Copyrighted Works and has the authorization to file the instant action.
- 42. Upon information and belief, Defendants have exploited the Copyrighted Works by one or more of the following: (a) exhibiting the Copyrighted Works on their websites and in other promotional and publicity materials; (b) preparing or causing to be prepared derivative works based upon the Copyrighted Works; and (c) distributing copies of

the Copyrighted Works to the public by sale or other transfer of ownership, or by rental, lease or lending.

- 43. Defendants' conduct as alleged above was never authorized, licensed, permitted or ratified by Plaintiff or his agents.
- 44. Upon information and belief, as a direct and proximate result of their wrongful conduct, Defendants have realized and continue to realize profits and other benefits based on their unauthorized use of the Copyrighted Works.
- 45. Upon information and belief, Defendants willfully engaged in, and are willfully engaging in, the acts complained of herein in conscious disregard of the rights of Plaintiff.
- 46. Defendants' aforementioned acts constitute willful copyright infringement in violation of 17 U.S.C. § 501.
- 47. As a direct and proximate result of the Defendants' infringement, Plaintiff has suffered and will continue to suffer money damages.

#### WHEREFORE, Plaintiff demands the following relief:

- 1. On the First Cause of Action:
- (a) An Order declaring that Defendants have willfully infringed Plaintiffs' copyrights in and to the Copyrighted Works;
- (b) An Order requiring Defendants to: (i) destroy all infringing materials; (ii) immediately cease and desist from distributing and exhibiting the Copyrighted Works; and (iii) provide a declaration from each of the Defendants certifying that all infringing materials have been destroyed;

- (c) Under 17 U.S.C. § 504, an award of actual damages and disgorgement of all profits attributable to exploitation of the Copyrighted Works;
  - (d) Under 17 U.S.C. § 504, an award of statutory damages;
- (e) An award of attorney's fees, prejudgment and post judgment interest on all sums, and costs under the Copyright Act; and
  - 2. Such other and further relief as the Court deems just and proper.

#### **DEMAND FOR JURY TRIAL**

Plaintiff Dustin W. Kessler demands a trial by jury on all issues so triable.

Dated: New York, New York July 19, 2013

ADAM RICHARDS LLC

By:

Adam Richards (AR-2489) Attorney for Plaintiff Dustin W. Kessler 90 Broad Street, 25<sup>th</sup> Floor New York, New York 10004 Telephone: (212) 233 4400

Fax: (212) 812 3328 adam@arichardslaw.com

# EXHIBIT A



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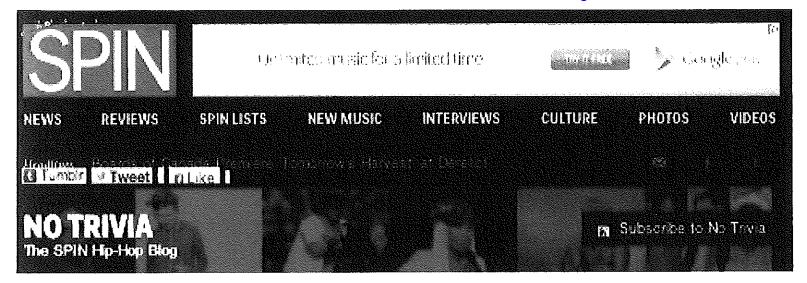
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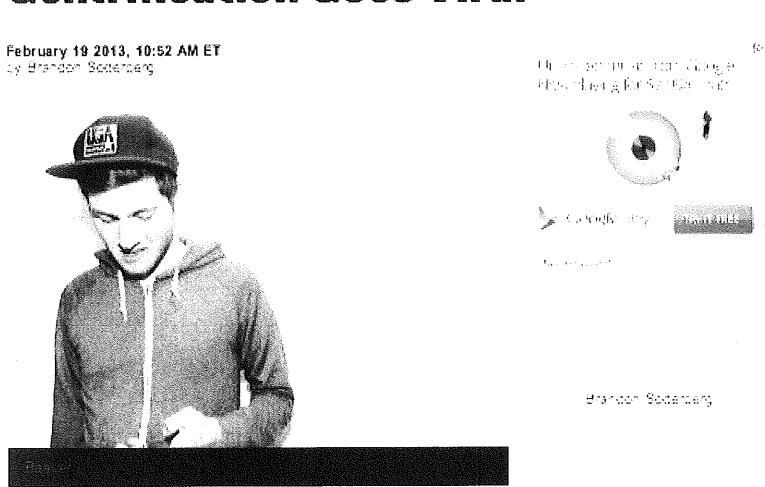
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# EXHIBIT B



## Baauer's 'Harlem Shake': Gentrification Goes Viral



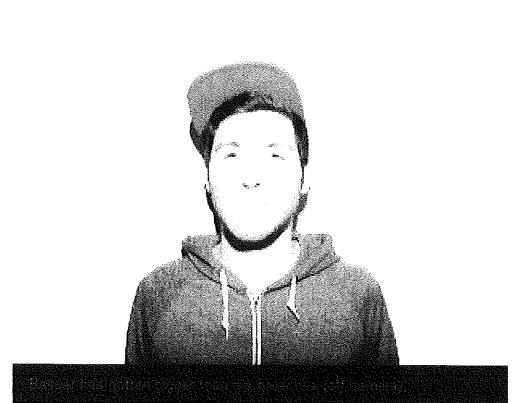
Trap-rave track games system, exploits Internet goodwill, blows up, grates nerves, inspires Azealia Banks

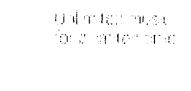


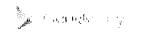
**BLOGS NEWSWIRE** 

# After Baauer's 'Harlem Shake' Goes Viral, Two Sampled Artists Go Unpaid

March 12 2013, 8:32 AM ET by Ones Marches













# EXHIBIT C



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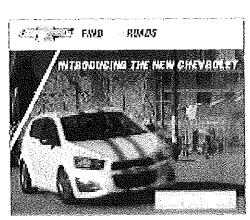




ARTICLES / COLUMNS / CHARTBEAT /

### Weekly Chart Notes: Baauer's 'Harlem' Begins To 'Shake' Up Radio 8y Gard tous: \* | March 08, 2013 6:16 PM EST





On the charts

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Baauer's 'Harlem Shake' Debuts Atop Revamped Hot 100

By . . . . . New York

# EXHIBIT D

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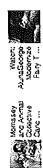


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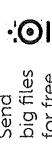


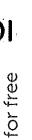
Two Artists Seek Compensation From Baauer, Mad Decent Over Unlicensed "Harlem Shake" Samples

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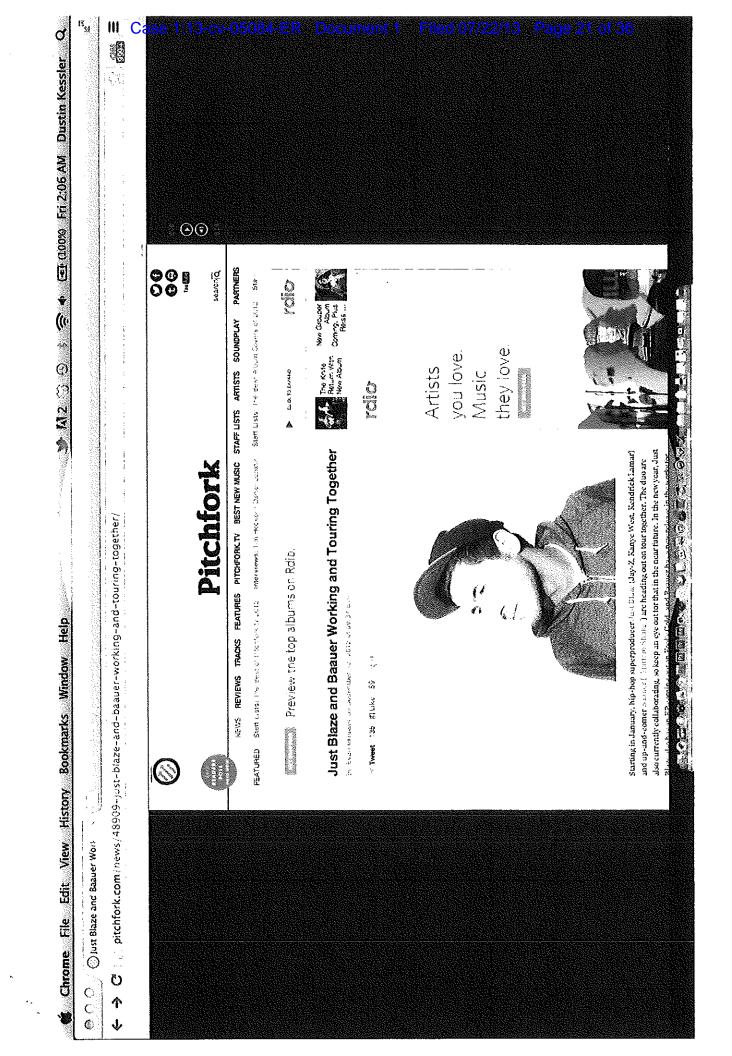
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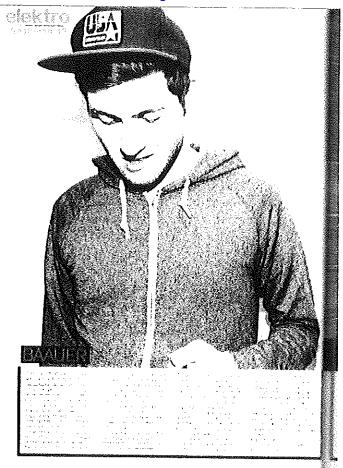
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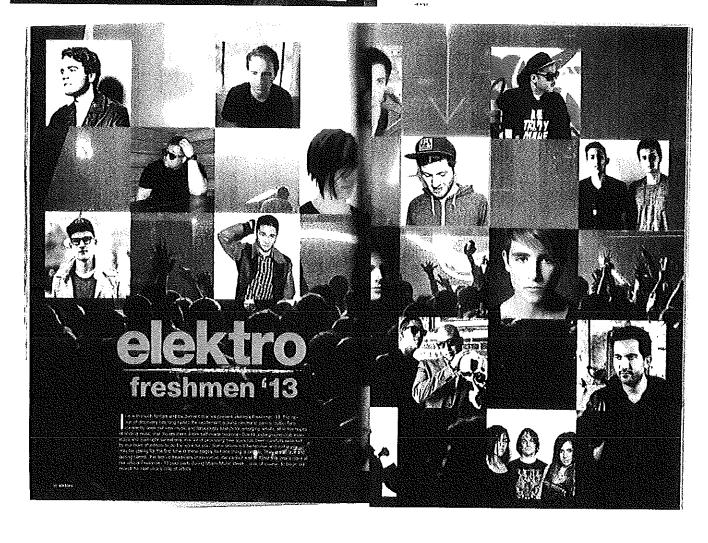
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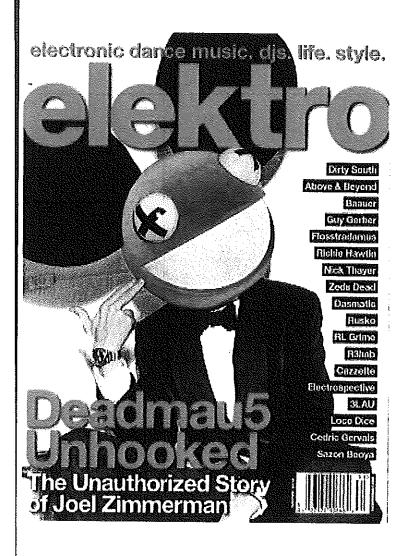


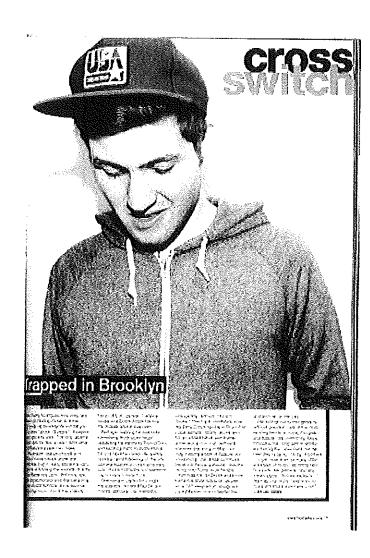
# EXHIBIT E

















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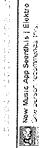


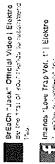


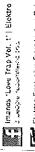








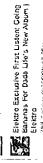














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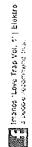












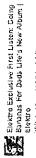
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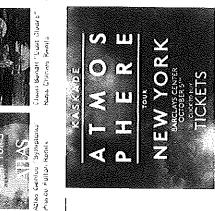




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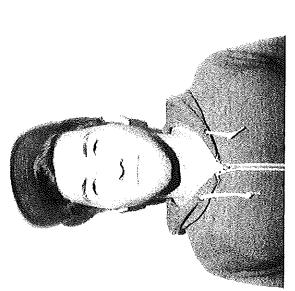








Elektro Exclusive First Liston: Going Bananas For Dada Life's New Album | Elektro



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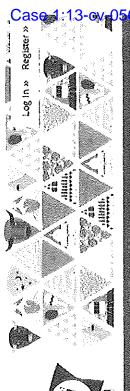
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# EXHIBIT F

# EXHIBIT G









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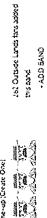






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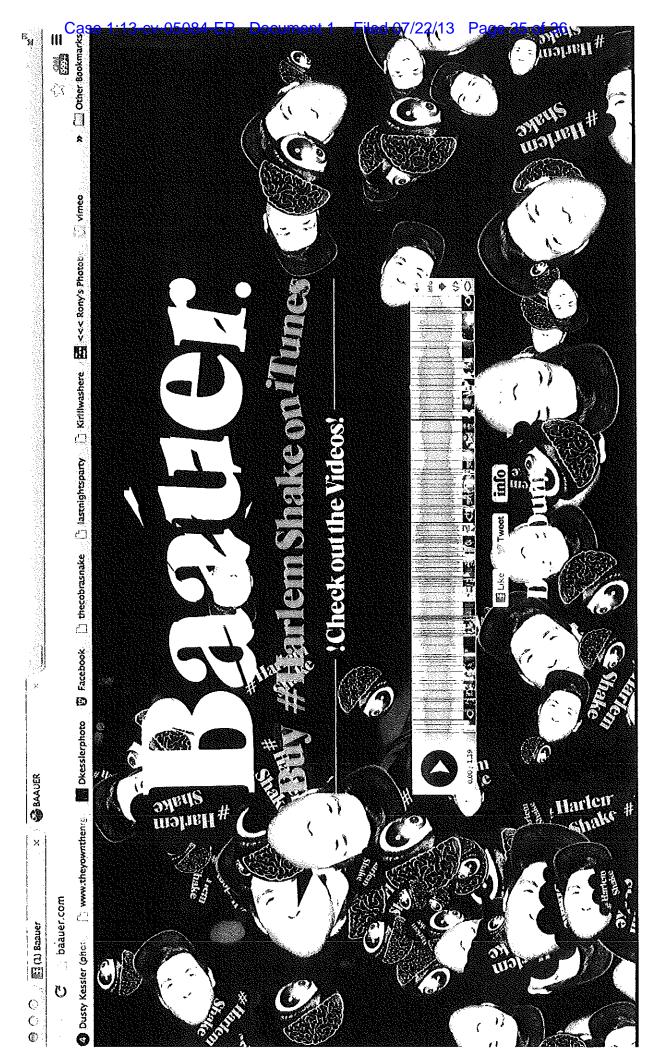
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# EXHIBIT H



# EXHIBIT I